

The Need for Statutes Regulating Artificial Insemination by Donors

I. INTRODUCTION

Human procreation can be accomplished through a variety of reproductive technologies that do not involve sexual intercourse. Among these artificial techniques are surrogate motherhood,¹ in which a woman is artificially inseminated² with a man's sperm, bears his child, and gives the child to the man and his wife to be raised as their child;³ in vitro fertilization, in which the egg and sperm are united in a culture dish, where the egg is fertilized and the resulting embryo implanted in the woman's uterus;⁴ and embryo or ovum transfer, in which an egg is fertilized in a donor and transferred to a prospective mother's womb.⁵

By far the most commonly used artificial reproductive technique has been artificial insemination by donor (AID),⁶ in which sperm from a donor is used to inseminate a woman who is not the donor's wife.⁷ Artificial insemination (AI) with

1. For information about surrogate reproduction, see Eisenman, *Fathers, Biological and Anonymous, and Other Legal Strangers: Determination of Parentage and Artificial Insemination by Donor Under Ohio Law*, 45 OHIO ST. L.J. 383, 393-96 (1984); Griffin, *Womb For Rent*, 9 STUDENT LAW. 29 (Apr. 1981); Comment, *Artificial Insemination and the Law*, 1982 B.Y.U. L. REV. 935, 950-52 [hereinafter cited as Comment, *AI and the Law*]; Comment, *Parenthood by Proxy: Legal Implications of Surrogate Birth*, 67 IOWA L. REV. 385 (1982); N.Y. Times, Aug. 9, 1984, at D29, col. 4; Friedrich, *A Legal, Moral, Social Nightmare*, Time, Sept. 10, 1984, at 54; Wallis, *A Surrogate's Story*, Time, Sept. 10, 1984, at 53; Wallis, *The New Origins of Life*, Time, Sept. 10, 1984, at 46; Jenkins, *Fertility Rights*, TWA Ambassador, Jan. 1985, at 60 (approximately 300 surrogate births have occurred in the United States).

2. Artificial insemination is "the introduction of semen into the vagina or cervix by artificial means," DORLAND'S ILLUS. MED. DICT. 669 (26th ed. 1981). A typical statutory definition is the "introduction of semen into a woman's vagina, cervical canal or uterus through the use of instruments or other artificial means." OR. REV. STAT. § 677.355 (1983).

3. Eisenman, *supra* note 1, at 393.

4. ENCY. OF BIOETHICS 1448-49 (1978). See also Andrews, *The Stork Market: The Law of the New Reproduction Technologies*, 70 A.B.A. J. 50 (Aug. 1984); Clapshaw, *Legal Aspects of Artificial Human Reproduction: Can the Law Afford to Play Ostrich?*, 4 AUCKLAND U. L. REV. 254, 262-69 (1982); Davies, *Close Encounters in a Test Tube*, 1983 NEW L.J. 107; Edwards, Steptoe & Purdy, *Establishing Full-Term Human Pregnancies Using Cleaving Embryos Grown In Vitro*, 87 BRIT. J. OBS. & GYN. 737 (Sept. 1980); Lorio, *In Vitro Fertilization and Embryo Transfer: Fertile Areas for Litigation*, 35 SW. L.J. 973, 975-76 (1982); Soupart, *Current Status of In Vitro Fertilization and Embryo Transfer in Man*, 23 CLIN. OBS. & GYN. 683 (Sept. 1980); Comment, *Protecting Inheritance Rights of Children Born Through In Vitro Fertilization and Embryo Transfer: Suggestions for a Legislative Approach*, 27 ST. LOUIS U.L.J. 901, 925-28 (1983) [hereinafter cited as Comment, *Protecting Inheritance Rights*]; Comment, *Love's Labor Lost: Legal and Ethical Implications in Artificial Human Procreation*, 58 U. DET. J. URB. L. 459 (1981) [hereinafter cited as Comment, *Love's Labor Lost*]; N.Y. Times, Aug. 9, 1984, at D29, col. 4; Friedrich, *supra* note 1, at 54; Wallis, *The New Origins of Life*, Time, Sept. 10, 1984, at 46. There have been approximately 100 in vitro or "test tube" births in this country. Jenkins, *supra* note 1, at 60.

5. Soupart, *supra* note 4. For discussions about ovum transfer, see generally Andrews, *supra* note 4, at 50-53; Lorio, *supra* note 4, at 973, 975-76; Comment, *Protecting Inheritance Rights*, *supra* note 4, at 901-02; Comment, *New Reproductive Technologies: The Legal Problem and a Solution*, 49 TENN. L. REV. 303, 325-28 (1982); N.Y. Times, Feb. 4, 1984, at 6, col. 1; Schmeck, Jr., "Prenatal Adoption" Is the Objective of New Techniques, N.Y. Times, June 14, 1983, at C1, col. 4. There have been two births by embryo transfer in the United States, the first in 1984. Jenkins, *supra* note 1, at 60.

6. Jenkins, *supra* note 1. For statistics, see *infra* text accompanying notes 11-14.

7. W. FINEGOLD, *ARTIFICIAL INSEMINATION* 3 (1964); Beck, *A Critical Look at the Legal, Ethical, and Technical Aspects of Artificial Insemination*, 27 FERTILITY & STERILITY 1 (Jan. 1976). See also Comment, *Protecting Inheritance Rights*, *supra* note 4, at 901 n.3. The other forms of artificial insemination (AI) include artificial insemination by husband (AIH) and confused artificial insemination (CAI), in which the husband's and donor's sperm are commingled before the wife is inseminated. Potential medical complications have resulted in the current disuse of CAI. Quinlivan & Sullivan, *Spermatozoal Antibodies in Human Seminal Plasma as a Cause of Failed Artificial Donor Insemination*, 28 FERTILITY & STERILITY 1082, 1082-85 (Oct. 1977).

the husband's sperm (AIH) is also performed,⁸ but will not be discussed here as it presents few legal problems. Artificial insemination by a donor frequently is used when the husband produces no sperm, has few motile sperm, a genetic defect, a family history of insanity, or an Rh incompatibility with his wife that could cause stillbirths.⁹

The first use of human AI in the United States was recorded in 1866.¹⁰ Before 1941, AI resulted in approximately 10,000 births in the United States;¹¹ between 1941 and 1963 approximately 1,000 to 1,200 children were conceived each year by this method.¹² Today, it is estimated that 6,000 to 20,000 AID births occur each year.¹³ Statistics on AID vary greatly because many doctors who perform AID either do not keep records of their work or protect their records with extreme secrecy to protect the donor's anonymity.¹⁴ In one survey, only thirty percent of responding doctors said they keep records of the identity of the donors.¹⁵ Despite the lack of accurate records

In each of the AI methods, the doctor uses a syringe to inject the husband's or donor's sperm into the wife's reproductive system. See, e.g., Wadlington, *Artificial Insemination: The Dangers of a Poorly Kept Secret*, 64 NW. U.L. REV. 777, 781 (1970).

8. Verkauf, *Artificial Insemination: Progress, Polemics, and Confusion—An Appraisal of Current Medico-Legal Status*, 3 Hous. L. REV. 277, 302 (1966); Comment, *Artificial Insemination and the Law*, *supra* note 1, at 936. AIH may be employed for a variety of psychological and physical reasons, including the following: the man's sperm count is low, see J. McCLINTIC, *BASIC ANATOMY AND PHYSIOLOGY OF THE HUMAN BODY* 519, 521 (1975); the man is impotent, see McCLINTIC at 521, the man has an organic defect with his penis, see DORLAND'S ILLUS. MED. DICT. 643 ("hypospadias") (26th ed. 1981), the cervical secretions are hostile to the sperm, see W. FINEGOLD, *ARTIFICIAL INSEMINATION* 17 (1964), or physical conditions in the woman hinder the proper migration of the sperm, see Comment, *AI and the Law*, *supra* note 1, at 936. See also Wadlington, *supra* note 7, at 782.

9. Weisman, *The Medical Viewpoint*, 7 SYRACUSE L. REV. 96, 97 (1955). See also Comment, *AI and the Law*, *supra* note 1, at 937.

10. Comment, *AI and the Law*, *supra* note 1, at 938. Dr. J. Marion Sims inseminated six women with their husbands' sperm; one became pregnant. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* See also Andrews, *supra* note 4; Annas, *Fathers Anonymous: Beyond the Best Interests of the Sperm Donor*, 14 FAM. L.Q. 1 (1980); Griffin, *supra* note 1; Wadlington, *supra* note 7, at 785.

14. Curie-Cohen, Luttrell & Shapiro, *Current Practice of Artificial Insemination by Donor in the United States*, 300 NEW ENG. J. MED. 585 (Mar. 1979). See also Stone, *Complications and Pitfalls of Artificial Insemination*, 23 CLIN. OBS. & GYN. 667 (Sept. 1980); Annas, *supra* note 13, at 10; Eisenman, *supra* note 1, at 386 n.25, 391; Wadlington, *supra* note 7, at 785 n.35.

Accurate statistics on the number of doctors performing AID, or the number of births through AID, are unavailable. None of the following organizations collected such statistics or knew of any other statistical compilations: American Association of Tissue Banks, American Bar Foundation, American College of Obstetrics & Gynecology, American Fertility Society, American Medical Association, Ohio Section of the American College of Obstetrics & Gynecology, and the Ohio State Medical Association. Dr. J.K. Sherman, Prof. of Anatomy, Univ. of Ark. for Med. Sciences, completed a survey in May 1984 which showed that over 24,000 children worldwide had been conceived by the use of AID with frozen sperm. He stated that this is a very conservative estimate, since it includes statistics only from doctors responding to the survey. Frozen sperm have been used in AID since 1955 but have been used frequently only in the past five years. Generalizations as to the percentage of AID children conceived with the use of frozen as opposed to fresh sperm cannot be made because records are rarely kept. Thus, no extrapolation to the number of children conceived with fresh donor sperm can be drawn from this survey. Telephone interview with Dr. J.K. Sherman, Prof. of Anatomy, Univ. of Ark. for Med. Sciences (Feb. 27, 1985).

15. Curie-Cohen, Luttrell & Shapiro, *supra* note 14, at 585. See also Annas, *supra* note 13, at 10; Eisenman, *supra* note 1, at 391.

The doctors the author contacted all kept coded records of the donor's identity; the doctor alone could identify a donor. Most of the doctors stated that they would not reveal the donor's identity, even in a courtroom. Telephone interviews with: Dr. James Goldfarb, Repro. Endocrin., Cleveland, Ohio (Feb. 4, 1985); Dr. Leonard Levine, Urologist, Fargo, N.D. (Feb. 28, 1985); Dr. Grant Schmidt, Asst. Prof. Obs. & Gyn., Ohio St. Univ. (Jan. 29, 1985); Dr. Frederick Schweizer, Repro. Endocrin., Columbus, Ohio (Jan. 30, 1985); and Dr. J.K. Sherman, Prof. of Anatomy, Univ. of Ark. for Med. Sciences (Feb. 27, 1985). Some doctors use double-blind procedures so that even the doctors do not know which

about donors, authorities agree that approximately ten to twenty percent¹⁶ of married¹⁷ couples in the United States are infertile.

Because the use of artificial insemination by donor is widespread in the United States, the legal system needs to respond to the problems that can affect AID-conceived children, sperm donors, doctors, and intended parents (those who use donor insemination to conceive). This Note will examine the few AID cases that have been heard in this country and current statutes that regulate this procedure. It will then analyze Ohio's current paternity law,¹⁸ and several of the problems¹⁹ that could occur using this procedure in Ohio or in any state that lacks an AID statute.²⁰ This Note will then look at House Bill 147 (HB 147),²¹ a legislative attempt to add a provision for artificial insemination by donor to Ohio's paternity law. Finally, it will present ideas for drafting an AID statute, and will discuss the need for such laws. This Note will not examine the following topics, which are too comprehensive to be addressed here: religious aspects of artificial insemination by a donor;²² father's rights;²³ donor insemination as

patient is inseminated with a particular donor's sperm. Telephone interview with Dr. Leonard Levine, Urologist, Fargo, N.D. (Feb. 28, 1985). According to one source, the need for donor anonymity is critical. In response to a new law in Sweden which gives children the right to learn who their biological parents are, it was anticipated that the use of AID would "come to a virtual stop in Sweden." *Kids Must Know Fathers*, Columbus Dispatch, Mar. 3, 1985, at 4D, col. 1.

16. See Griffin, *supra* note 1, at 29; Comment, *New Reproductive Technologies: The Legal Problem and a Solution*, *supra* note 5, at 311; Wallis, *supra* note 1, at 46, 50; Jenkins, *supra* note 1, at 60. See also Policy Analysis Panel of Commission on Interprof. Educ. and Prac., *Report of Interprofessional Policy Analysis Panel on Alternative Modes of Reproduction, Section I: Model Statute Regarding Artificial Insemination*, Preamble at 1 (Nov. 8, 1984) (available at Office of Commission on Interprof. Educ. and Prac., The Ohio St. Univ. College of Educ.) (hereinafter cited as *Model Statute*).

17. This Article will discuss only AID and married persons. For discussions of AID and single persons, see generally *C.M. v. C.C.*, 152 N.J. Super. 160, 377 A.2d 821 (Cumberland County Ct. 1977) (known donor of sperm to single woman entitled to visitation rights); Kern and Ridolfi, *The Fourteenth Amendment's Protection of a Woman's Right to Be a Single Parent Through Artificial Insemination by Donor*, 7 WOMEN'S RTS. L. RPT. 251 (1982) (methods of AID available to single women); Kritchevsky, *The Unmarried Woman's Right to Artificial Insemination: A Call for an Expanded Definition of Family*, 4 HARV. WOMEN'S L.J. 1 (1981); Shaman, *Legal Aspects of Artificial Insemination*, 18 J. FAM. L. 331, 344-46 (1979-1980). See also Comment, *AI and the Law*, *supra* note 1, at 953 n.77; *Model Statute*, *supra* note 16, Commentary to Statute at 2. The statistics on infertility for married couples are similar to those for single persons. Andrews, *supra* note 4, at 50 ("[w]ith infertility on the rise . . . now affecting one in six people"); *Model Statute*, *supra* note 16, Preamble at 1 ("15%-20% of the reproductive age-group population"). Only the AID statute in Oregon specifically deals with single women and AID. OR. REV. STAT. § 677.365(1) (1983), see *infra* note 102.

18. OHIO REV. CODE ANN. §§ 3111.01-.19 (Page Supp. 1984).

19. Since the purpose of this Article is to present a suggested legislative approach to procedures for artificial insemination by donor, the discussion of problems will be used only to demonstrate why statutes are necessary. For a list of the numerous law journal articles discussing the problems associated with donor insemination, see *infra* note 137.

20. States that lack AID laws may declare a child to be illegitimate. A child born within lawful wedlock and presumed to be the genetic offspring of the husband and wife was given the status of legitimacy. 10 AM. JUR. 2d *Bastard* §§ 10-18 (1981). At common law, an illegitimate child had no legal parents; *id.* § 8, but "[t]he common law of illegitimacy is unusually unsuited to modern conditions." Krause, *Bringing the Bastard into the Great Society—A Proposed Uniform Act on Legitimacy*, 44 TEX. L. REV. 829, 831 (1966). For general discussions of the history of the concept of illegitimacy, see Venezia, *The Rights of an Illegitimate Child Post-Gomez v. Perez: A Legitimate Situation?*, 12 ST. MARY'S L.J. 199 (1980); Verkauf, *supra* note 8, at 302-05; Comment, *Protecting Inheritance Rights*, *supra* note 4, at 903, 913-21.

21. House Bill 147, 115th Gen. Assem., Reg. Sess. (1983) [hereinafter referred to as HB 147].

22. For discussions of the religious debates regarding AID, see generally Annas, *supra* note 13, 4-5; Fullerton, *Artificial Insemination*, 2 FAM. L. REV. 31, 32-33 (1979); Rice, *AID—An Heir of Controversy*, 34 NOTRE DAME LAW. 510, 525-28 (1959); Verkauf, *supra* note 8, at 277-78, 289-90; Wadlington, *supra* note 7, at 785 n.37; Comment, *Love's Labor Lost*, *supra* note 4, at 460-64; 4 ENCY. OF BIOETHICS 1444, 1460-62 (1978).

23. The following cases focus on the father's rights and artificial insemination by donor: *C.M. v. C.C.*, 152 N.J. Super. 160, 377 A.2d 821 (Cumberland County Ct. 1977); *People ex rel. Abajian v. Dennett*, 15 Misc. 2d 260, 184

adultery;²⁴ sperm banks and the Rule Against Perpetuities;²⁵ and conflict of laws problems.²⁶

II. AID CASES DECIDED IN THE UNITED STATES

Fewer than one dozen cases regarding artificial insemination by donor have been heard in this country.²⁷ These cases have led to differing and confusing conclusions, demonstrating the need for new statutes to guide the courts when dealing with artificial insemination, a procedure not contemplated when paternity laws were written.

Hoch v. Hoch,²⁸ decided in 1945, was the first American case to mention artificial insemination. Alleging adultery, a husband sought divorce on the grounds that his wife was pregnant when he returned from World War II.²⁹ The wife claimed to have been artificially inseminated with a donor's sperm. Based on testimony that the wife had numerous male friends, the court awarded the husband his divorce.³⁰ The court did mention that it would not deem artificial insemination to be adultery.

Strnad v. Strnad,³¹ decided three years after *Hoch*, dealt with the husband's visitation rights to a child conceived, during the marriage and with the husband's consent, by artificial insemination. Upon separation, the wife sued to determine her husband's rights to the child. In an unusual decision, the court held that "the child has been potentially adopted or semi-adopted."³² No reasoning was offered for this proposition. In dicta, again without explanation, the court noted that, if the husband consented to the procedure, the effect of artificial insemination is not illegitimacy.³³

Another visitation rights case, *Ohlson v. Ohlson*,³⁴ was decided in 1954. In *Ohlson*, artificial insemination by donor was admittedly performed, but the perform-

N.Y.S.2d 178 (Sup. Ct. 1958) (husband granted visitation rights); *Strnad v. Strnad*, 190 Misc. 786, 78 N.Y.S.2d 390 (Sup. Ct. 1948) (husband granted visitation rights to child created by AID with husband's consent).

24. The implications of AID as adultery have been discussed in *Shaman*, *supra* note 17, at 333-34; Comment, *AI and the Law*, *supra* note 1, at 956-66.

25. For discussions about sperm banks and the Rule Against Perpetuities, see generally Fullerton, *supra* note 22, at 32; Sappideen, *Life After Death—Sperm Banks, Wills and Perpetuities*, 53 *Austn. L.J.* 311 (1979); Comment, *Love's Labor Lost*, *supra* note 4, at 469, 470 n.80.

26. A comprehensive discussion of AID and conflict of laws problems occurs in Ehrenzweig, *The "Bastard" in the Conflict of Laws—A National Disgrace*, 29 *U. CHI. L. REV.* 498 (1962); see also Krause, *supra* note 20, at 830-31.

27. These cases illustrate that present case law and statutes are insufficient to protect the parties involved in the insemination procedure. For discussions of AID cases and statutes in other countries, see generally Clapshaw, *supra* note 4, at 254; Wadlington, *supra* note 7, at 786-87; Comment, *AI and the Law*, *supra* note 1, at 939-44; Comment, *Love's Labor Lost*, *supra* note 4, at 464-66.

28. No. 44-C-8307 (Unreported, Cir. Ct. Cook County, Ill. 1945); see "Wife Tells Veteran of 'Test Tube' Baby; He Wins Divorce," *Chicago Sun*, Feb. 10, 1945, at 13, col. 3.

29. *Chicago Sun*, *supra* note 28.

30. *Id.*

31. 190 Misc. 786, 78 N.Y.S.2d 390 (Sup. Ct. 1948).

32. *Id.* at 787, 78 N.Y.S.2d at 391. For a rejection of this result by another New York court, see *Gursky v. Gursky*, 39 Misc. 3d 1083, 1087, 242 N.Y.S.2d 406, 410-11 (Sup. Ct. 1963).

33. 190 Misc. 786, 787, 78 N.Y.S.2d 390, 392 (Sup. Ct. 1948).

34. No. 53-S-1410 (Sup. Ct. Cook County, Ill. Nov. 1954); see also *Medicolegal Aspects of Artificial Insemination: A Current Appraisal*, 157 *J. AM. MED. A.* 1638, 1639 (Apr. 1955) [hereinafter cited as *Medicolegal Aspects*].

ing doctor could not conclusively state that the husband had not fathered the child.³⁵ The court therefore found that the evidence did not outweigh the presumption of legitimacy since the child was born in wedlock.³⁶ The court issued no specific statements about the medical procedure used.³⁷

In *Doornbos v. Doornbos*,³⁸ a husband had consented to his wife's artificial insemination by donor but failed to adopt the resultant child in a legal proceeding. The wife sought a divorce and a declaratory judgment that the husband was not in fact the child's father and had no right to the child.³⁹ The court granted the declaratory judgment regarding the husband's visitation rights, but disagreed with the wife's contention that the insemination was not adulterous.⁴⁰ The only clue to the court's reasoning is the statement that artificial insemination by donor, "with or without the consent of [the] husband, is contrary to public policy and good morals, and constitutes adultery on the part of the mother. A child so conceived is not a child born in wedlock and [is] therefore illegitimate."⁴¹

The next divorce and visitation rights case was *People ex rel. Abajian v. Dennett*,⁴² in which a wife claimed that her husband was not the children's father because they were created by artificial insemination. In a New York court, the husband won continuance of the visitation rights he had obtained in a divorce decree in Nevada, where the wife lived with the children after separating from her husband. The court decided that the wife's previous conduct, including granting the husband rights in the divorce decree, demonstrated a recognition of her husband's rights to the children. Therefore, she was estopped from asserting that he was not the children's father.⁴³

*Gursky v. Gursky*⁴⁴ was also decided on estoppel grounds. The husband had consented in writing to his wife's receiving donor sperm, had agreed to pay the costs of the procedure, and was listed as the child's father on the birth certificate.⁴⁵ Nonetheless, when he sought a separation and was counter-sued for annulment, the husband claimed that he was not the child's father.⁴⁶ The court ruled that because the husband consented to the insemination, he was estopped from claiming a lack of liability for the child's support. Ironically, the court also decided that the child was illegitimate.⁴⁷

The State Legislature has exercised its power to modify the concept of illegitimacy in certain respects. . . . The fact that it has not chosen to deal with the question of legitimacy

35. *Medicolegal Aspects*, *supra* note 34, at 1639.

36. *Id.*

37. *Id.*

38. No. 54-S-14981 (Ill. Sup. Ct. Dec. 13, 1954) (summarized in 23 U.S.L.W. 2308 (Jan. 4, 1955)), *appeal dismissed*, 12 Ill. App. 2d 473, 139 N.E.2d 844 (1956) (not published in full) (dismissed on procedural grounds).

39. 12 Ill. App. 2d 473, 139 N.E.2d 844 (1956).

40. *Id.*

41. 23 U.S.L.W. 2308 (Jan. 4, 1955).

42. 15 Misc. 2d 260, 184 N.Y.S.2d 178 (Sup. Ct. 1958).

43. *Id.*

44. 39 Misc. 2d 1083, 242 N.Y.S.2d 406 (Sup. Ct. 1963).

45. *Id.* at 1084-85, 242 N.Y.S.2d at 408.

46. *Id.* at 1084, 242 N.Y.S.2d at 407.

47. *Id.* at 1088, 242 N.Y.S.2d at 411.

as it relates to children begotten and born through heterologous artificial insemination [AID] must be deemed to manifest a disinclination to modify . . . a concept which must logically result only in a determination adverse to the legitimacy of a child begotten by a father other than the husband of the mother.⁴⁸

Thus, the court refused to legislate or reinterpret New York's existing statutes.⁴⁹

The country's next AID case was *Anonymous v. Anonymous*.⁵⁰ On facts quite similar to those in *Gursky*, the husband was held liable for support, despite the child's illegitimacy, and the child was found illegitimate, despite the husband's consent to AID.⁵¹

The first AID case to be decided by a state's highest court, *People v. Sorensen*,⁵² occurred in California in 1968. Having obtained her husband's written consent, a woman had been artificially inseminated, and she bore a child.⁵³ When the couple divorced, the wife declined support payments; when she became ill and began receiving public support, the district attorney sued the husband for support.⁵⁴ The court held the husband liable for support, finding that the intent of the state's support statute led to a determination that he was the lawful father.⁵⁵ According to the court, this result would prevent the "obvious injustice that would result were a child artificially conceived excluded from the protection of a law intended to benefit all minors, legitimate or illegitimate."⁵⁶ Further, the court noted that the "public policy of this state favors legitimation."⁵⁷ Unlike the New York court in *Gursky*, the California Supreme Court stated, "In the absence of legislation prohibiting artificial insemination, the offspring of defendant's valid marriage to the child's mother was lawfully begotten and was not the product of an illicit or adulterous relationship."⁵⁸

In re Adoption of Anonymous,⁵⁹ decided in 1973, presented a unique issue among cases dealing with this procedure. The husband had consented in writing to his wife's artificial insemination, and was listed on the child's birth certificate as the child's father.⁶⁰ After the parents' divorce, the husband supported and visited the child.⁶¹ When his wife remarried and her second husband attempted to adopt the child, the first husband refused to consent.⁶² The wife argued in court that her first husband was not the parent of the child since he was not its biological father. The New York court rejected this argument⁶³ and held that "a child born of consensual AID during a valid marriage is a legitimate child entitled to the rights and privileges of a

48. *Id.* at 1087, 242 N.Y.S.2d at 410.

49. *Id.* at 1086, 242 N.Y.S.2d at 409.

50. 41 Misc. 2d 886, 246 N.Y.S.2d 835 (Sup. Ct. 1964).

51. *Id.* at 888, 246 N.Y.S.2d at 836-37.

52. 68 Cal. 2d 280, 437 P.2d 495, 66 Cal. Rptr. 7 (1968).

53. *Id.* at 282, 437 P.2d at 497, 66 Cal. Rptr. at 9.

54. *Id.*

55. *Id.* at 285, 437 P.2d at 499, 66 Cal. Rptr. at 11.

56. *Id.* at 288, 437 P.2d at 501, 66 Cal. Rptr. at 13.

57. *Id.*

58. *Id.* at 289, 437 P.2d at 501, 66 Cal. Rptr. at 13.

59. 74 Misc. 2d 99, 345 N.Y.S.2d 430 (Sur. Ct. 1973).

60. *Id.* at 101, 345 N.Y.S.2d at 431.

61. *Id.*

62. *Id.*

63. See *supra* text accompanying note 47. *Id.* at 104, 345 N.Y.S.2d at 434.

naturally conceived child of the same marriage.”⁶⁴ In part, the court’s reasoning was based on the notion that “[i]t serves no purpose whatsoever to stigmatize the AID child; or to compel the parents formally to adopt” in light of the state’s liberal statute that conferred legitimacy upon children born of void or voidable marriages.⁶⁵

The next case to be decided in the United States, *C.M. v. C.C.*,⁶⁶ involved an unique issue concerning the visitation rights of an unwed father-donor to the child he helped create with an unmarried female. The couple, who intended to marry, successfully performed artificial insemination by themselves when a doctor refused to inseminate the woman.⁶⁷ Six months before the AID-conceived child was born, the couple ended their relationship.⁶⁸ After the child’s birth the donor-father sued for visitation rights. Because C.M. was willing to assume the responsibilities of a father, the court allowed him to do so, citing law which favors a child’s having both a father and a mother.⁶⁹ However, using common law principles,⁷⁰ the court also held that the child was illegitimate, as its parents had never married.⁷¹

The most recent case to consider artificial insemination by donor, *K.S. v. G.S.*, addressed the issue of a husband’s consent to his wife’s use of the procedure.⁷² In this divorce case, the husband, attempting to avoid liability for the support of an AID-conceived child, stipulated that he verbally consented to his wife’s first series of insemination attempts,⁷³ but that he later told his wife “to stop the AID treatments because of the cost”⁷⁴ after the first successful insemination resulted in a miscarriage. The court declared the defendant to be the child’s lawful father for several reasons.⁷⁵ The court disbelieved the defendant’s testimony that he withdrew his consent to further insemination attempts, and it believed the wife’s testimony that her husband had accompanied her to the doctor’s office on several occasions after the supposed withdrawal of his consent.⁷⁶ The court also noted that:

Public policy considerations seeking to prevent children born as a result of AID procedures from becoming public charges or being bastardized require that a presumption of consent exist and that a strong burden be placed on one seeking to rebut the presumption. . . . [C]onsent of the husband . . . , once given, is presumed to be effective at the time when pregnancy occurs, unless the husband establishes by clear and convincing evidence that such consent has been revoked or rescinded. Defendant has not met that burden.⁷⁷

64. *Id.* at 105, 345 N.Y.S.2d at 435–36.

65. *Id.* at 105, 345 N.Y.S.2d at 435.

66. 152 N.J. Super. 160, 377 A.2d 821 (Cumberland County Ct. 1977).

67. *Id.* at 161, 377 A.2d at 821–22.

68. *Id.* at 161, 377 A.2d at 822.

69. *Id.* at 163, 377 A.2d at 825.

70. *See supra* note 20.

71. 152 N.J. Super. 160, 161, 377 A.2d 821, 822 (Cumberland County Ct. 1977).

72. 182 N.J. Super. 102, 440 A.2d 64 (Super. Ct. 1981).

73. *Id.* at 104, 440 A.2d at 65.

74. *Id.* at 105, 440 A.2d at 66.

75. *Id.* at 110, 440 A.2d at 68.

76. *Id.* at 105, 440 A.2d at 66.

77. *Id.* at 109, 440 A.2d at 68.

The defendant was required to provide some financial support for the child, and was granted visitation rights if he wished to exercise them.⁷⁸

In conclusion, even the most recent cases to consider this procedure do not establish conclusively that AID-conceived children born of married parents are free of the stigma of illegitimacy, nor do courts comprehensively address the issues of the rights and duties of donors or prospective parents. The statutes that do exist to regulate artificial insemination describe the child's status more uniformly but are grossly inadequate regarding other legal implications of the practice.

III. AID STATUTES IN THE UNITED STATES

Since 1964, twenty-eight states have passed statutes regarding artificial insemination by donor.⁷⁹ Nine states⁸⁰ enacted statutes modeled after the National Conference of Commissioners on Uniform State Laws' Model Uniform Parentage Act (UPA).⁸¹ The UPA was designed to establish that the rights of illegitimate⁸² and legitimate children should be equal,⁸³ and is largely directed toward "the identification of the person against whom these rights may be asserted."⁸⁴ The Act defines the parent and child relationship,⁸⁵ states that the relationship applies regardless of the parents' marital status,⁸⁶ and offers rebuttable presumptions of parentage.⁸⁷ The Act also outlines standing requirements⁸⁸ and procedures explaining how a parentage suit may be brought.⁸⁹ Recognizing the need for some legislation regarding artificial insemination by donor,⁹⁰ the commissioners also included a skele-

78. *Id.* at 110, 440 A.2d at 69.

79. ALA. CODE § 26-17-21 (Supp. 1985); ALASKA STAT. § 25.20.045 (Supp. 1983); ARK. STAT. ANN. § 61-141 (1971); CAL. CIV. CODE § 7005 (West Supp. 1983); COLO. REV. STAT. § 19-6-106 (1978); CONN. GEN. STAT. §§ 45-69f to -69n (1981); FLA. STAT. ANN. § 742.11 (West Supp. 1985); GA. CODE ANN. § 19-7-21 (1982); IDAHO CODE §§ 39-5401 to -5407 (1985); ILL. ANN. STAT. ch. 40 §§ 1451-1453 (Smith-Hurd Supp. 1985); KAN. STAT. ANN. §§ 23-128 to -130 (1981); LA. CIV. CODE ANN. art. 188 (West Supp. 1985); MD. EST. & TRUSTS CODE ANN. § 1-206(b) (1974); MD. HEALTH-GEN. CODE ANN. § 20-214 (1982); MICH. COMP. LAWS ANN. §§ 333.2824, 700.111 (West 1980); MINN. STAT. ANN. § 257.56 (West 1982); MONT. CODE ANN. § 40-6-106 (1983); NEV. REV. STAT. § 126.061 (1979); N.J. STAT. ANN. § 9:17-44 (West Supp. 1985); N.Y. DOM. REL. LAW § 73 (McKinney 1977); N.C. GEN. STAT. § 49A-1 (1984); OKLA. STAT. ANN. tit. 10 §§ 551-53 (West Supp. 1985); OR. REV. STAT. §§ 109.239, 109.243, 109.247, 677.355-.70 (1983); TENN. CODE ANN. § 53-446 (Supp. 1982); TEX. FAM. CODE ANN. § 12.03 (Vernon 1975); VA. CODE § 64.1-7.1 (1980); WASH. REV. CODE ANN. § 26.26.050 (Supp. 1985); WIS. STAT. ANN. §§ 767.47(9) (West 1981) and 891.40 (West Supp. 1985); WYO. STAT. § 14-2-103 (1978).

Only two states are currently considering legislation concerning AID. Ohio's proposed statute will be discussed in this Article. Rep. Richard Fitzpatrick, from Michigan's 49th District, introduced House Bill 4114 to Michigan's legislature in 1983. The Bill died in the House in December 1984. The Bill, which would pertain to all reproductive techniques, would sanction whatever reasonable contracts the involved parties create. The Bill will be reintroduced soon. Telephone interview with Richard Fitzpatrick, Rep., Mich. Legis., 49th Dist. (Feb. 27, 1985).

80. California, Colorado, Illinois, Minnesota, Montana, Nevada, New Jersey, Washington, and Wyoming.

81. UNIF. PARENTAGE ACT (1979), 9A U.L.A. 579 (1979) [hereinafter cited as UPA].

82. See *supra* note 20.

83. UPA, 9A U.L.A. 581 (Commissioners' Prefatory Note) (1979).

84. *Id.*

85. UPA § 1, 9A U.L.A. 587 (1979).

86. UPA § 2, 9A U.L.A. 588 (1979).

87. UPA §§ 3-4, 9A U.L.A. 589-91 (1979).

88. UPA § 6, 9A U.L.A. 593 (1979).

89. UPA §§ 6-24, 9A U.L.A. 593-616 (1979).

90. UPA § 5, 9A U.L.A. 593 (Commissioners' Comment) (1979).

tal AID section⁹¹ and urged state legislators to give consideration to other legal aspects of the procedure.⁹²

The nine states which adopted the section regarding artificial insemination did not make substantial additions to the UPA.⁹³ The Act establishes that if a husband and wife consent in writing to have the wife artificially inseminated by a donor, and the insemination is performed by a licensed doctor, the "husband is treated in law as if he were the natural father of a child thereby conceived."⁹⁴ The consent form is to be filed with the state department of health and kept in a sealed file. Although the doctor's failure to file the form does not affect the parent and child relationship, neither does it result in sanctions.⁹⁵ Finally, the Act states that a man who donates sperm for the artificial insemination of a married woman, other than the donor's wife, is treated in law as if he were not the natural father of a child thereby conceived.⁹⁶

Statutes dealing with artificial insemination in the other nineteen states vary greatly. The provision most common to the statutes is that the husband and wife must both consent in writing to insemination in order for the statute to apply.⁹⁷ Fourteen states require the consent form to be filed with the state department of health, department of vital statistics, or a local court,⁹⁸ and two states permit the consent form to be filed in the doctor's office.⁹⁹ Although ten of the nineteen non-UPA statutes require a licensed doctor to perform the insemination for the statute to apply,¹⁰⁰ only three states give any protection to doctors administering the procedure.¹⁰¹ All the

91. UPA § 5, 9A U.L.A. 593 (1979).

92. UPA § 5, 9A U.L.A. 593 (Commissioners' Comment) (1979).

93. For example, California, Colorado, Washington, and Wyoming have declared that the donor is not the child's natural father, regardless of whether the donee is married or single. These provisions do not provide substantially greater protection than the UPA. See text accompanying note 94. CAL. CIV. CODE § 7005 (West Supp. 1983); COLO. REV. STAT. § 19-6-106 (1978); WASH. REV. CODE ANN. § 26.26.050 (Supp. 1985); WYO. STAT. § 14-2-103 (1978).

94. UPA § 5, 9A U.L.A. 592 (1979). For the purposes of this Article, it is assumed that these are natural expectations of the parties when they contemplate the procedure. The desires of the parties may change, as when the donor seeks visitation rights. However, these rights should be fixed prior to the insemination, not by legal proceedings after the birth of the child.

95. *Id.*

96. UPA § 5, 9A U.L.A. 593 (1979).

97. It is interesting that although written consent is required, there are no sanctions if the consent form is not filed with any authority. See *supra* text accompanying note 95.

Only six states, Arkansas, Louisiana, Maryland, Michigan, Tennessee, and Texas, do not require written consent from both the husband and wife. Of these, all but Louisiana require that the husband alone consent. Louisiana has a unique statute which declares that a husband who has consented to his wife's insemination cannot disavow his paternity. Consent is not defined, and no cases have been decided under this provision. LA. CIV. CODE ANN. art. 188 (West Supp. 1985).

98. ALA. CODE § 26-17-21 (Supp. 1984); COLO. REV. STAT. § 19-6-106 (1978); CONN. GEN. STAT. § 45-69h (1981); IDAHO CODE § 39-5403 (1985); KANSAS STAT. ANN. § 23-130 (1981); MINN. STAT. ANN. § 257.56 (West 1982); MONT. CODE ANN. § 40-6-106 (1983); NEV. REV. STAT. § 126.061 (1979); N.J. STAT. ANN. § 9:17-44 (West Supp. 1985); OKLA. STAT. ANN. tit. 10 § 553 (West Supp. 1985); OR. REV. STAT. § 677.365(2) (1983); WASH. REV. CODE ANN. § 26.26.050 (Supp. 1985); WIS. STAT. ANN. § 767.47(9) (West 1981); WYO. STAT. § 14-2-103 (1978). In Colorado, Minnesota, Montana, Nevada, New Jersey, Washington, and Wyoming the statute is part of the state's UPA.

99. CAL. CIV. CODE § 7005 (West Supp. 1983); ILL. ANN. STAT. ch. 40 § 1453 (Smith-Hurd Supp. 1985). For privacy concerns explaining why records should be kept in doctors' offices, see *infra* note 187.

100. ALA. CODE § 26-17-21 (Supp. 1985); ALASKA STAT. § 25.20.045 (Supp. 1983); CONN. GEN. STAT. §§ 45-69f to -69h (1981); GA. CODE ANN. § 43-34-42(a) (1984); IDAHO CODE § 39-5402 (1985); N.Y. DOM. REL. LAW § 73 (McKinney 1977); OKLA. STAT. ANN. tit. 10 § 553 (West Supp. 1985); OR. REV. STAT. § 677.360 (1983); VA. CODE § 64.1-7.1 (1980); WIS. STAT. ANN. § 891.40 (West Supp. 1985). All of the UPA-styled AID statutes require a licensed doctor to perform the procedure for the statute to apply.

101. ALA. CODE § 26-17-21 (Supp. 1985); GA. CODE ANN. § 43-34-42(b) (1984); MD. HEALTH-GEN. CODE ANN. § 20-214 (1982).

statutes, except Oregon's,¹⁰² state or imply that the law applies only to married women. In general, the statutes state either that the husband is the natural father of the child,¹⁰³ or that the child is the legitimate¹⁰⁴ or natural¹⁰⁵ child of the husband who consented to his wife's insemination. In only two states is this presumption irrebuttable.¹⁰⁶ Eleven statutes specifically provide that the donor is not the natural father of the child.¹⁰⁷

Unfortunately, most existing AID statutes do not regulate the donor's medical condition, nor do they stipulate that donors do not have any rights or duties to the child. Only Idaho,¹⁰⁸ New Jersey,¹⁰⁹ and Washington¹¹⁰ restrict the donor's responsibilities and rights, and only Idaho¹¹¹ and Oregon¹¹² require donors to meet certain medical standards in order to donate sperm.

Current statutes, both in states which have passed the UPA and in those which have not, are skeletal in nature and offer inadequate protection to the parties involved in the artificial insemination procedure¹¹³—donors, prospective parents, children, and doctors. Yet they do offer statutory confirmation that AID-conceived children should be treated as natural children of the consenting couple. Further, they offer a framework for legislatures to build on as problems arise and amendments become necessary.

In states that have not adopted a statute regulating artificial insemination by donor, parties must still approach these questions in a judicial forum, with scattered, limited, and inconsistent cases to guide them.¹¹⁴ Worse yet, three states, including Ohio, have passed a version of the UPA without adopting a provision concerning

102. OR. REV. STAT. § 677.365(1) (1983). Oregon's statute says AI should not be performed without the woman's prior written consent, "and, if she is married, the prior written request and consent of her husband." *Id.*

103. ALA. CODE § 26-17-21 (Supp. 1985); CAL. CIV. CODE § 7005 (West Supp. 1983); COLO. REV. STAT. § 19-6-106 (1978); ILL. ANN. STAT. ch. 40 § 1453(a) (Smith-Hurd Supp. 1985); MICH. COMP. LAWS ANN. § 333.2824 (West 1980); MINN. STAT. ANN. § 257.56 (West 1982); MONT. CODE ANN. § 40-6-106 (1983); NEV. REV. STAT. § 126.061 (1979); N.J. STAT. ANN. § 9:17-44 (West Supp. 1985); WIS. STAT. ANN. § 767.47(9) (West 1981); WIS. STAT. ANN. § 891.40 (West Supp. 1985); WYO. STAT. § 14-2-103 (1978).

104. ARK. STAT. ANN. § 61-141 (1971); FLA. STAT. ANN. § 742.11 (West Supp. 1985); GA. CODE ANN. § 19-7-21 (1982); MD. EST. & TRUSTS CODE ANN. § 1-206(b) (1974); MICH. COMP. LAWS ANN. § 333.2824(6) (West 1980); TENN. CODE ANN. § 53-446 (Supp. 1982); TEX. FAM. CODE ANN. § 12.03 (Vernon 1975).

105. ALASKA STAT. § 25.20.045 (Supp. 1983); CONN. GEN. STAT. § 45-69i (1981); IDAHO CODE § 39-5405(3) (1985); ILL. ANN. STAT. ch. 40 § 1452 (Smith-Hurd Supp. 1985); KAN. STAT. ANN. § 23-129 (1981); N.Y. DOM. REL. LAW § 73 (McKinney 1977); N.C. GEN. STAT. § 49A-1 (1984); OKLA. STAT. ANN. tit. 10 § 552 (West Supp. 1985); VA. CODE §§ 64.1-7.1 (1980).

106. FLA. STAT. ANN. § 742.11 (West Supp. 1985); GA. CODE ANN. § 19-7-21 (1982).

107. ALA. CODE § 26-17-21 (Supp. 1985); CAL. CIV. CODE § 7005 (West Supp. 1983); COLO. REV. STAT. § 19-6-106 (1978); ILL. ANN. STAT. ch. 40 § 1453(b) (Smith-Hurd Supp. 1985); MINN. STAT. ANN. § 257.56 (West 1982); MONT. CODE ANN. § 40-6-106 (1983); NEV. REV. STAT. § 126.061 (1979); N.J. STAT. ANN. § 9:17-44 (West Supp. 1985); TEX. FAM. CODE ANN. § 12.03 (Vernon 1975); WASH. REV. CODE ANN. § 26.26.050 (Supp. 1983-1984); WYO. STAT. § 14-2-103 (1978).

108. IDAHO CODE § 39-5405(1) (1985).

109. N.J. STAT. ANN. § 9:17-44 (West Supp. 1985).

110. WASH. REV. CODE ANN. § 26.26.050(2) (Supp. 1985).

111. IDAHO CODE § 39-5404 (Supp. 1985).

112. OR. REV. STAT. § 677.370 (1983), which provides that "no semen shall be donated for use in artificial insemination by any person who: (1) Has any disease or defect known by him to be transmitted by genes; or (2) Knows or has reason to know he has a venereal disease."

113. See, e.g., Comment, *Protecting Inheritance Rights*, *supra* note 4, at 914-15, 921. See also *infra* notes 137-65 and accompanying text.

114. See *supra* notes 28-71 and accompanying text.

artificial insemination.¹¹⁵ The presumptions,¹¹⁶ standing requirements, and evidentiary methods appropriate in a parentage suit under these statutes, when applied to AID situations, lead to results contrary to the parties' expectations and to good public policy. This Article will discuss Ohio's Uniform Parentage Act (OPA) in the context of artificial insemination by a donor and will demonstrate the need for change in North Dakota's and Hawaii's laws, as well as in the laws of all states lacking an AID statute. It will then describe Ohio's House Bill 147¹¹⁷ which proposes to add a provision concerning artificial insemination to Ohio law. Finally, the issues that a model statute should address in order to protect all the parties potentially affected by the procedure will be identified.

IV. OHIO'S UNIFORM PARENTAGE ACT—ANALYSIS AND POTENTIAL PROBLEMS

The OPA¹¹⁸ was passed by Ohio's General Assembly on March 3, 1982, and became law on June 29, 1982.¹¹⁹ According to Helen Fix, the legislator who introduced the OPA into the General Assembly, the purpose of the OPA was to update Ohio's paternity laws to make it easier to identify fathers.¹²⁰ Before the OPA was passed, genetic or blood tests could be admitted into evidence in a paternity suit only to disprove paternity.¹²¹ The OPA changed this aspect of parentage law¹²² and also offered a new definition of the parent-child relationship.¹²³ Contrary to the idea of parentage based upon the concept of legitimacy, as determined by the woman's marital status,¹²⁴ the OPA determines parentage based upon biological or adoptive relationships.¹²⁵ The parent and child relationship "extends equally to all children and all parents, regardless of the marital status of the parents."¹²⁶ That relationship is the

115. HAWAII REV. STAT. §§ 584-1 to -26 (1976); N.D. CENT. CODE §§ 14-17-01 to -26 (1981); OHIO REV. CODE ANN. §§ 3111.01-.19 (Page Supp. 1984).

116. See *infra* text accompanying notes 128-36 for the presumptions in Ohio's statute.

117. HB 147, *supra* note 21.

118. OPA, *supra* note 18.

119. Am. Sub. H.B. 245, *reprinted in* 1982 Ohio Legis. Serv. 5-47 (Baldwin). No legislative history is available in Ohio; thus, interviews were used to determine how the OPA was introduced in Ohio. Telephone interview with Helen Fix, State Employment Relations Board member, former Representative to the Ohio General Assembly (Feb. 4, 1985). Helen Fix introduced Am. Sub. H.B. 245 on the urging of the Cincinnati Bar Association. The Bar wanted genetic tests to be admissible in paternity suits to prove and disprove paternity. See *infra*, note 121. This use of genetic tests would allow the state to attempt to identify those responsible for a child's support, thereby decreasing the number of women on welfare rolls.

Ms. Fix and a Cincinnati member of the Ohio Bar Association drafted an act regarding the use of genetic tests. In Ohio, such drafts are presented to a Legislative Service Commission (LSC), which then drafts its own suggested legislation. The LSC recommended that Ms. Fix look at the OPA to see if she wanted the bill to address more issues than just the use of tests. Once in the General Assembly, the final draft of the bill was further amended due to the concerns of the Ohio Bar Association, Fathers for Equal Justice, and County Commissioners. Telephone interview with Helen Fix, Ohio State Employment Relations Board member (Feb. 4, 1985).

120. See *supra* note 119.

121. OHIO REV. CODE ANN. § 3111.16 (*repealed* 1982).

122. OHIO REV. CODE ANN. §§ 3111.09-.10 (Page Supp. 1984).

123. OHIO REV. CODE ANN. § 3111.01 (Page Supp. 1984).

124. OHIO REV. CODE ANN. § 3111.01 (*repealed* 1982). See *Walker v. Stokes*, 54 Ohio App. 2d 119, 375 N.E.2d 1258 (1977); Eisenman, *supra* note 1, at 384-87; Frankart, *The Determination of Parentage Under the New Ohio Parentage Act*, 55 OHIO B.A. REP. 1248 (1982).

125. OHIO REV. CODE ANN. § 3111.01 (Page Supp. 1984).

126. OHIO REV. CODE ANN. § 3111.01(B) (Page Supp. 1984).

"legal relationship that exists between a child and the child's natural or adoptive parents and upon which this chapter and any other provision of the Revised Code confers or imposes rights, privileges, duties, and obligations."¹²⁷

Prior to the passage of the OPA, Ohio law recognized a strong presumption that a child born during a marriage was the child of the husband.¹²⁸ Under the present law, however, a man is presumed to be the natural father of a child under any of the following circumstances:

(1) The man and the child's mother are or have been married to each other, and the child is born during the marriage or is born within three hundred days after the marriage is terminated

(2) The man and the child's mother attempted, before the child's birth, to marry each other . . . , [and] the marriage is or could be declared invalid

(3) The man and the child's mother, after the child's birth, married or attempted to marry each other . . . and any of the following occur:

(a) The man has acknowledged his paternity . . . ;

(b) The man, with his consent, is named as the child's father on the child's birth certificate;

(c) The man is required to support the child

(4) The man, with his consent, signs the birth certificate.¹²⁹

When the OPA's new definition of the parent-child relationship is read in conjunction with the provisions regarding the presumptions about the natural father, a sperm donor could be found to be the child's father.¹³⁰ While the UPA avoids this problem by including a section which protects donors,¹³¹ the OPA was introduced without a provision concerning artificial insemination by donor.¹³² No amendment to the OPA has filled this void.

In addition, while these provisions still lead to a presumption that the husband is the natural father, they are rebuttable by clear and convincing evidence to the contrary.¹³³ In a section 3111.04 paternity suit,¹³⁴ the following evidence of paternity is admissible under section 3111.10:

(A) Evidence of sexual intercourse between the mother and alleged father at any possible time of conception;

(B) An expert's opinion concerning the statistical probability of the alleged father's paternity, which opinion is based upon the duration of the mother's pregnancy;

127. OHIO REV. CODE ANN. § 3111.01(A) (Page Supp. 1984).

128. OHIO REV. CODE ANN. § 3111.16 (*repealed* 1982); *Gray v. Richardson*, 474 F.2d 1370, 1372 (6th Cir. 1973).

129. OHIO REV. CODE ANN. § 3111.03(A) (Page Supp. 1984).

130. OHIO REV. CODE ANN. § 3111.03 (Page Supp. 1984). *See also Model Statute*, *supra* note 16, Commentary to Statute at 1.

131. UPA § 5, 9A U.L.A. 593 (1979).

132. Telephone interview with Helen Fix, Ohio State Employment Relations Board member (Feb. 4, 1985). Ms. Fix stated that there was no intent to omit the AID provision. Since her initial interest was with the introduction of genetic testing as evidence of paternity, a section dealing with artificial insemination was not included. Because the Bill was amended numerous times, she was surprised that this oversight was never corrected.

133. OHIO REV. CODE ANN. § 3111.03(B) (Page Supp. 1984).

134. OHIO REV. CODE ANN. § 3111.04 (Page Supp. 1984).

(C) Genetic test results, weighted in accordance with evidence, if available, of the statistical probability of the alleged father's paternity;

(D) Medical evidence relating to the alleged father's paternity of the child based on tests performed by experts. . . .

(E) All other evidence relevant to the issue of paternity of the child.¹³⁵

When combined, the presumptions of paternity and admissions of evidence of paternity can lead to legal dilemmas for a donor when protective AID statutes are nonexistent.¹³⁶

A. Potential Problems for Donors¹³⁷

Suppose that a married woman received artificial insemination by a donor without her husband's consent. Should the husband decide to bring a paternity action,¹³⁸ he could gain access to his wife's medical records since the OPA does not require them to be sealed.¹³⁹ Section 3111.10(E), quoted above, allows all relevant evidence to be admitted in the paternity action.¹⁴⁰ Thus, assuming such evidence exists, the identity of the donor is subject to discovery. Once the donor is brought into court, it may, upon its own or a party's motion, order the mother, alleged fathers, and child to undergo genetic testing.¹⁴¹ The availability of a variety of increasingly sophisticated genetic tests makes it possible to determine biological parentage with a high degree of accuracy, usually over ninety percent.¹⁴²

135. OHIO REV. CODE ANN § 3111.10 (Page Supp. 1984).

136. See *supra* text accompanying notes 133-35.

137. The great number of problems that could affect sperm donors, prospective parents, children, and doctors have been exhaustively discussed in a number of law journal articles. This Article will discuss only the problems that can occur under the OPA, in order to demonstrate why an AID statute is necessary. For further examples of support, visitation, inheritance, and malpractice problems likely to occur when AID statutes are lacking, see Annas, *supra* note 13 (problems of all); Andrews, *supra* note 4, at 52-53, 56 (problems for parent and child); Biskind, *Legitimacy of Children Born by Artificial Insemination*, 5 J. FAM. L. 39 (1965) (problems of child); Clapshaw, *supra* note 4, at 256-62, 269-72 (problems for parents and child); Davies, *supra* note 4 (problems of all); Fullerton, *supra* note 22 (problems of all); Knoppers, *The "Legitimization" of Artificial Insemination: Promise or Problem?*, 1 FAM. L. REV. 108 (1978) (problems of all); Shaman, *supra* note 17, at 333-50 (problems of all); Smith, *Great Expectations or Convolved Realities: Artificial Insemination in Flux*, 3 FAM. L. REV. 37 (1980) (problems for doctors and donors); Verkauf, *supra* note 8, at 297-308 (problems of all); Comment, *AI and the Law*, *supra* note 1, at 956-79 (problems for parents and child); Comment, *Artificial Insemination—Upon Whom Shall the Duty to Support Rest?*, 17 DE PAUL L. REV. 575 (1968) (problems of child).

138. OHIO REV. CODE ANN. § 3111.04 (Page Supp. 1984) allows a man alleged to be the child's father to bring a paternity action. This Article will not discuss maternity suits since these occur in the surrogate parent situation. The OPA establishes a presumption of maternity, OHIO REV. CODE ANN. § 3111.02 (Page Supp. 1984), which can be rebutted, as could the presumption of paternity discussed in the text. Section 3111.17 makes all sections of the OPA applicable to maternity actions. OHIO REV. CODE ANN. § 3111.17 (Page Supp. 1984).

139. OHIO REV. CODE ANN. § 3111.07 (Page Supp. 1984) (alleged father is proper party to action). Of course, the records may not reveal who the donor is. See *supra* text accompanying notes 14-15.

140. OHIO REV. CODE ANN. § 3111.10(E) (Page Supp. 1984).

141. OHIO REV. CODE ANN. §§ 3111.08-.09 (Page Supp. 1984).

142. Terasaki, *Resolution by HLA Testing of 1000 Paternity Cases not Excluded by ABO Testing*, 16 J. FAM. L. 543 (1977-1978). The "simplest and least expensive test for exclusion of paternity" is the ABO red cell test. *Id.* at 554. Unfortunately, this test effectively excludes only approximately 10% of putative parents. *Id.* at 555. The Human Leukocyte Antigens (HLA) test, *id.* at 545, in use since the early 1970s, *id.* at 544, is at the opposite extreme. The test allows an accurate determination of a child's genotype, *id.* at 545, which is composed of one haplotype from each parent; combined with an analysis of the known parent's genotype, the genotype of the other biological parent can be determined by a process of elimination. *Id.* at 545-46. Since each haplotype is almost unique, one or a series of HLA tests can lead to an accuracy rate greater than 90%, and as high as over 99% in some cases. *Id.* at 552. See also Forrest, *The Legal*

Sophisticated genetic testing thus affords the evidence necessary to determine that the sperm donor is the biological parent of the child. In the hypothetical situation of a married woman conceiving artificially without her husband's consent, the husband could use genetic testing to rebut the presumption that he is the child's father.¹⁴³ A court faced with this evidence would be forced either to ignore the evidence and declare the child to be the husband's, or declare that the biological father is the man responsible for all duties to his natural child. The latter decision would be contrary to the wishes of the mother and the donor.

Even if the wife and donor had created a written agreement regarding parentage, this contract would not bar a suit under section 3111.04.¹⁴⁴ The only way to protect the donor is with a provision, similar to Florida¹⁴⁵ and Georgia¹⁴⁶ statutes, stating that an AID-produced child is irrebuttably presumed to be legitimate if husband and wife consented in writing to the procedure.¹⁴⁷

Unprotected by a statute concerning artificial insemination, the donor in Ohio also faces the same scenario if the donee-wife's husband dies while the child is younger than twenty-three years of age¹⁴⁸ and the donee-wife decides to sue the donor. Since the statute of limitations under the OPA extends until the child attains the age of twenty-three,¹⁴⁹ it is possible that a consenting donee would decide to sue the donor for child support. No cases have yet been heard on these facts, or on most fact situations involving artificial insemination by donor,¹⁵⁰ so there is no judicial statement about the problem.

In addition, the child conceived by artificial insemination may attempt to sue the donor for support. In Ohio, section 3111.04(A) affords the child the right to bring a paternity action.¹⁵¹ The child might decide to sue if his or her mother's husband had not consented to the procedure and would not support the child, if the husband died, or if the child was seeking a portion of the donor's estate.¹⁵²

Implications of HLA Testing for Paternity, 16 J. FAM. L. 537, 540 (1977-1978). As one authority on HLA tests noted, "[t]he HLA system of tissue types is so powerful in determining the probability of paternity that many of the older rules of evidence for blood tests in disputed paternity cases now require complete revision." Terasaki, *supra*, at 543. As the Ohio Supreme Court noted in *Owens v. Bell*, 6 Ohio St. 3d 46, 451 N.E.2d 241 (1983), in recent years the HLA tests have been legally recognized as evidence regarding the probability of paternity. See also *Willerick v. Hanshall*, 136 Mich. App. 484 (1984).

143. See *supra* text accompanying notes 135-42.

144. OHIO REV. CODE ANN. § 3111.04(B) (Page Supp. 1984).

145. FLA. STAT. ANN. § 742.11 (West Supp. 1985).

146. GA. CODE ANN. § 19-7-21 (1982).

147. The other AID statutes merely establish a rebuttable presumption that the child is legitimate.

148. OHIO REV. CODE ANN. § 3111.05 (Page Supp. 1984).

149. *Id.*

150. See *supra* text accompanying notes 28-78 for the limited issues decided in AID cases.

151. OHIO REV. CODE ANN. § 3111.04(A) (Page Supp. 1984).

152. The statute of limitation for bringing the paternity action is explicitly preempted by the limitation for bringing suit against a decedent's estate. OHIO REV. CODE ANN. § 3111.05 (Page Supp. 1984); outside Ohio, see, e.g., MONT. CODE ANN. § 40-6-108(4) (1983); NEV. REV. STAT. § 126.081(2) (1979). This time limit is often six months after the filing of the estate's closing statement. UNIF. PROBATE CODE § 3-1005, 8 U.L.A. 405 (1983).

B. Potential Problems for AID-Conceived Children and Their Consenting Parents

Just as the donor may face unexpected problems due to his sperm donation, the AID-produced child and his or her parents can also find themselves placed in complex and sensitive situations due to the lack of a relevant statute establishing the child's and parents' rights. Through a paternity action, a donor could attempt to obtain access to the insemination records, if any, since they are "relevant to the issue of paternity of the child."¹⁵³ The donor could then sue the child's supposed parents for visitation rights, causing great confusion to the child. While this may sound unlikely, a similar situation has occurred in New Jersey in *C.M. v. C.C.*¹⁵⁴

The child is also susceptible to a judicial declaration that the child has no father, since its biological father is not married to its mother and the man married to its mother is not the child's natural father.¹⁵⁵ Should the court so decide, the child could be prevented from inheriting from the husband or its biological mother. Were the wife inseminated without her husband's consent, there is some chance that the wife's other children could keep the AID-conceived child from inheriting a share of the estate left to their father's children.¹⁵⁶

C. Potential Problems for Doctors

Just as donors, children, and parents face potential difficulties when statutes concerning artificial insemination by donor are lacking, doctors are potentially liable because of the lack of protective provisions. Only Alabama,¹⁵⁷ Georgia,¹⁵⁸ and Maryland¹⁵⁹ specifically protect doctors. Alabama's statute states that the supervising physician shall not incur liability due to the AID procedure.¹⁶⁰ Georgia's statute provides that if a doctor performs AID with the written consent of both husband and wife, the doctor is not civilly liable to the husband, wife, or child, unless he or she was negligent.¹⁶¹ Maryland protects the doctor only from civil or disciplinary liability for refusing to perform, participate in, or make referrals regarding this procedure.¹⁶² In any other state, it is possible for the child to sue the doctor for allowing a genetic disorder to be transmitted to the child.¹⁶³ The child's parents could also sue the

153. OHIO REV. CODE ANN. § 3111.10(E) (Page Supp. 1984). The physician-patient privilege could prevent this problem, except in cases such as *C.M. v. C.C.*, see *supra* text accompanying notes 66-71, or when the woman's medical chart is filed separately from insemination records.

154. 152 N.J. Super. 160, 377 A.2d 821 (Cumberland County Ct. 1977) (case discussed at text accompanying notes 66-71, *supra*); but see *In re Connolly*, 43 Ohio App. 2d 38, 332 N.E.2d 376 (1974) (visitation rights denied to biological father of child conceived in an extramarital affair when the mother subsequently married a man who assumed the role of father). See also *Model Statute*, *supra* note 16, Commentary to Statute at 1 (Under Ohio law, a donor theoretically could ask a court to declare him the natural father with the rights accompanying that status.).

155. See *supra* text accompanying notes 28-78.

156. See *supra* note 20.

157. ALA. CODE § 26-17-21 (Supp. 1985).

158. GA. CODE ANN. § 43-34-42(b) (1984).

159. MD. HEALTH-GEN. CODE ANN. § 20-214 (1982).

160. ALA. CODE § 26-17-21 (Supp. 1985).

161. GA. CODE ANN. § 43-34-42(b) (1984).

162. MD. HEALTH-GEN. CODE ANN. § 20-214 (1982).

163. See *Curlender v. Bio-Science Laboratories*, 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (1980); see generally *Capron, Tort Liability in Genetic Counseling*, 79 COLUM. L. REV. 618 (1979).

doctor.¹⁶⁴ Even if the consent form signed by the parents released the doctor from liability, it is unlikely that the courts would respect this agreement. Although consent forms for artificial insemination by donors have not yet been tested in the courts, similar forms have been declared ineffective in cases holding that persons cannot avoid their negligence by contract.¹⁶⁵

While the aforementioned problem scenarios confronting donors, children, parents, and doctors present just a few of the many difficulties that can occur under the OPA,¹⁶⁶ they serve to demonstrate the need for a comprehensive statute to prevent problems that can arise from conflicting interpretations of artificial insemination cases and statutes.

The passage of the OPA without a provision regarding artificial insemination by donor has directly affected the practice of insemination in Columbus, Ohio. One doctor said that while approximately forty percent of local obstetricians used to perform artificial inseminations, this number decreased to approximately five percent following passage of the OPA.¹⁶⁷ Another local doctor, who formerly performed approximately 150 insemination procedures per month, is currently involved in only approximately five such procedures a month, because of doctors' and donors' fears of liability. He claims that there is "absolutely no question at all" that this decrease is due to the passage of the OPA.¹⁶⁸ Thus, change in the law is needed now. In Ohio, House Bill 147¹⁶⁹ has been offered as an amendment to section 3111.03 of the OPA,¹⁷⁰ and would put a skeletal AID provision in the law.

164. See, e.g., *Becker v. Schwartz*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978) (parents sued doctor for "wrongful life" for alleged negligence in failing to inform prospective parents properly of risks of pregnancy, thus affecting their decision to continue with pregnancy; parents could recover for cost of long-term institutional care for mentally retarded child that otherwise might have been aborted); see also *Smith*, *supra* note 137, at 38-42; *Jenkins*, *supra* note 1, at 62 (husband claimed defective sperm used).

165. See *Shaman*, *supra* note 17, at 348 (courts reluctant to allow people to contract away their negligence). See, e.g., *Annot.*, 6 A.L.R. 3d 704 (1966).

166. See *supra* note 128.

167. Telephone interview with Dr. Grant Schmidt, Asst. Prof. Obs. & Gyn., Ohio State Univ. (Jan. 29, 1985).

168. Telephone interview with Dr. Frederick Schweizer, Repro. Endocrin., Columbus, Ohio (Jan. 30, 1985). He now obtains sperm from out-of-state donors rather than local donors, at twice the cost of using fresh sperm. *Id.* Drs. Schweizer and Schmidt of Columbus believe their use of AID has been affected adversely because they tell donors about the gaps in Ohio law. Telephone interviews with Dr. Grant Schmidt, Asst. Prof. of Obs. & Gyn., Ohio State Univ. (Jan. 29, 1985); Dr. Frederick Schweizer, Repro. Endocrin., Columbus, Ohio (Jan. 30, 1985). Outside Columbus, doctors have not seen a decrease in AID use or participation by donors since the passage of the OPA. Telephone interview with Dr. James Goldfarb, Repro. Endocrin., Cleveland, Ohio (Feb. 4, 1985). The author could not locate any doctors in Hawaii or North Dakota, the other UPA states without AID provisions, who had noticed a decrease in the use of AID since the passage of their state's UPA. A possible inference is that the decrease in the number of donors in Columbus, Ohio is due to the amount of information that the Columbus doctors tell prospective donors.

Some doctors recognize the benefits that an AID statute can provide. Telephone interviews with Dr. Leonard Levine, Urologist, Fargo, N.D. (Feb. 28, 1985); Dr. Grant Schmidt, Asst. Prof. Obs. & Gyn., Ohio State Univ. (Jan. 29, 1985); Dr. Frederick Schweizer, Repro. Endocrin., Columbus, Ohio (Jan. 30, 1985). Others believe that the AID system works fine now, and that legal involvement would only cause problems. Telephone interviews with Dr. James Goldfarb, Repro. Endocrin., Cleveland, Ohio (Feb. 4, 1985); Dr. J.K. Sherman, Prof. of Anatomy, Univ. of Ark. for Med. Sciences (Feb. 27, 1985).

169. HB 147, *supra* note 21.

170. OHIO REV. CODE ANN. § 3111.03 (Page Supp. 1984).

V. HOUSE BILL 147

House Bill 147 (HB 147)¹⁷¹ was introduced into Ohio's General Assembly on February 10, 1983.¹⁷² After the House Committee on Civil and Commercial Law considered the bill, it was passed by the House with a unanimous vote.¹⁷³ The Bill was sent to the Senate Judiciary Committee, where it simply died.¹⁷⁴ The Bill was reintroduced as House Bill 476 on April 18, 1985.¹⁷⁵ House Bill 476 is being considered in hearings by the House Judiciary and Criminal Justice Committee, which will be asked to accept Substitute House Bill 476 for consideration when the General Assembly reconvenes.¹⁷⁶ Due to the uncertain

171. See *supra* note 21. There is no legislative history available on this Bill. The LSC Bill analyses merely reiterate the provisions of the Bill without explanation. See Ohio Legis. Serv. Commission, 115th Gen. Ass., Bill Analysis, HB 147 (as introduced); Bill Analysis, HB 147 (as reported by House Civil and Commercial Law Committee).

172. Telephone interview with General Assembly librarian (Jan. 18, 1985).

173. *Id.*

174. *Id.* Rep. Marie Tansey, the representative who introduced the Bill, states that although it met with no strong opposition, political problems led to inaction. No legislative history is available on the Senate Committee's discussions. Telephone interview with Rep. Marie Tansey, Ohio Gen. Assem. (Jan. 18, 1985).

175. House Bill 476, 116th Gen. Assem., Reg. Sess. (1985) [hereinafter cited as HB 476].

176. Telephone interview with Rep. Marie Tansey, Ohio Gen. Assem. (Aug. 2, 1985). In HB 476, the provisions regarding AID are found in sections 3111.30 to 3111.38, and are more detailed than those offered in HB 147. HB 476, *supra* note 175. The Bill contains definitions of the terms "artificial insemination" and "physician." *Id.* § 3111.30(A)-(B). Section 3111.31 states that sections 3111.30 through 3111.38 do not apply to "surrogate motherhood or artificial insemination of women who are not married." HB 476, § 3111.31. Section 3111.32 of the Bill would require that all AID procedures be performed by a physician or a person under the control and supervision of a doctor. HB 476, § 3111.32.

House Bill 476 also provides that fresh semen may be used for AID only if the doctor who will accept the semen for donation has received a complete medical history of the donor within one year of the donation and has given the donor a physical examination. HB 476, § 3111.33(B). The donor must also be tested for blood type and RH factor immediately before the semen donation. The Bill would allow the use of frozen semen for AID if additional tests are performed on the semen. HB 476, § 3111.33(C).

The Bill also details the information which must be provided on the written consent form signed by both prospective parents before using the AID procedure. HB 476, § 3111.35(A). Included on this form would be provisions requiring anonymity between donors and prospective parents, "a statement that the wife and the husband understand that the physician cannot be responsible for the physical or mental characteristics of any child resulting from the artificial insemination," and "a statement that there is no guarantee that the wife will become pregnant." § 3111.35(A). The form would also contain particular information about the donor, if available to the doctor, such as the donor's medical history, race, eye color, and age. § 3111.35(A). House Bill 476 would permit the physician to reveal other information to prospective parents who request it, such as the donor's religious background, talents, and educational ability, and "information . . . that the donor has informed the physician may be disclosed to the wife and the husband." HB 476, § 3111.35(B). Section 3111.36 establishes recordkeeping requirements and provides that the written consent form, information about the donor, and AID records would be retained in the physician's office, filed separately from the wife's regular medical chart, and that the file would not be a public record. HB 476, § 3111.36(A). This section would also establish who could view the files and for what reasons. HB 476, § 3111.36(B). Information that the donor did not make available to prospective parents would be kept for five years, and would be revealed only upon court order, after the court determined that specific facts would be necessary or helpful in a child's medical treatment. HB 476, § 3111.36(C).

Section 3111.37 of HB 476 would establish an irrebuttable presumption that the child conceived as a result of AID is the natural child of the husband who consented to the use of the procedure, and that the donor would not be treated as the natural father of a child conceived with his semen. HB 476, § 3111.37. Section 3111.38 would provide that a physician's failure to comply with any of the requirements of sections 3111.30 through 3111.37 would "not affect the legal status, rights, or obligations of a child . . . , a wife . . . , a husband who consented . . . , or the man who was the donor." HB 476, § 3111.38.

Substitute House Bill 476, to be offered to the House Judiciary and Criminal Justice Committee when the Ohio General Assembly reconvenes, would amend HB 476 by adding definitions of "donor," "non-spousal artificial insemination," and "recipient" to the Bill. Telephone interview with Rep. Marie Tansey, Ohio Gen. Assem. (Aug. 2, 1985). This Bill substantially changes HB 476 in that section 3111.31 would no longer state that sections 3111.30 through 3111.38 do not apply to "artificial insemination of women who are not married." HB 476, § 3111.31. The sponsor of HB 476 opposed this change which would provide legal protection for single women who use AID and for their resulting children. Telephone interview with Rep. Marie Tansey, Ohio Gen. Assem. (Aug. 2, 1985). At a meeting regarding the

status of the amended bills, this Note will concentrate on the provisions of House Bill 147.

HB 147 is quite similar to section 5 of the UPA.¹⁷⁷ The Bill proposes to "amend section 3111.03 and to enact section 3111.031 of the Revised Code to specify that a husband who consents to the artificial insemination of his wife by another man shall be regarded as the natural father of the conceived child."¹⁷⁸ The Bill retains section 3111.03 of the OPA, relating to presumption of paternity,¹⁷⁹ as is, except to add the statement that "a conclusive presumption as described in section 3111.031 of the Revised Code cannot be rebutted."¹⁸⁰

Section 3111.031, which has no present counterpart in Ohio, would be Ohio's artificial insemination by donor provision.¹⁸¹ It provides that if a husband and wife consent in writing to have the wife artificially inseminated with a donor's sperm, and the procedure is performed by a licensed doctor, "the husband shall be treated in law and regarded as the natural father of the child so conceived and that the child shall be treated in law and regarded as the natural child of the husband."¹⁸² The conclusive presumption established under section 3111.03 will not be affected by any suit brought under sections 3111.01 to 3111.19 when this procedure is involved,¹⁸³ thereby precluding the aforementioned problems.¹⁸⁴ This provision represents a move in the proper direction, assuring rights to the child and conclusively determining a consenting husband's duties.

House Bill 147 purports to protect the child further by providing that the doctor who supervised the procedure should certify the husband's and wife's signatures, and file the consent form with the Department of Health.¹⁸⁵ The doctor's failure to comply with this part of the Bill would not affect the legal relationship between father and child.¹⁸⁶ Also, while a child may want to learn whether he was created by artificial insemination, the Bill would not place a penalty upon doctors not keeping this information on record.

Despite the lack of penalties, some doctors oppose filing consent forms with a government body. Some see it as an invasion of the privacy of the doctor and his patients,¹⁸⁷ or as a likely way for information to be given out when it should not

Bill, a local doctor, an American Medical Association representative, an attorney, and a staff employee of Ohio's Legislative Services Commission asked Ms. Tansey to include this change in Substitute House Bill 476. Interview with Rep. Tansey.

177. See *supra* text accompanying notes 90-92.

178. HB 147, *supra* note 21.

179. See *supra* text accompanying notes 128-36.

180. HB 147, *supra* note 21, § 3111.03(B).

181. HB 147, *supra* note 21, § 3111.031.

182. HB 147, *supra* note 21, § 3111.031(A).

183. HB 147, *supra* note 21, § 3111.03(B).

184. See *supra* text accompanying notes 137-65.

185. HB 147, *supra* note 21, § 3111.031(B).

186. *Id.* The failure to file appears to have no effect on any of the participants involved, since the Bill would impose no sanctions.

187. Rubin, *Year-Old Law Threatens to Bring Insemination into Light of Courtroom*, Columbus Citizen-Journal, June 28, 1983, at 6, col. 1; telephone interview with Dr. Frederick Schweizer, Repro. Endocrin., Columbus, Ohio (Jan. 30, 1985). Dr. Schweizer, one of only five reproductive endocrinologists in the Columbus, Ohio area, performs various artificial reproductive techniques, including AID, in his private practice. Dr. Schweizer believes so strongly in the privacy of AID that he keeps coded lists of his donors. Should a genetically defective baby ever be born to one of his AID patients,

be.¹⁸⁸ Further, doctors in the field appear to feel that the child should not be given access to such information, and they assert that very few, if any, AID-conceived children are even told of how they were conceived.¹⁸⁹

Nevertheless, the Bill does provide for some non-public¹⁹⁰ filing with the state. It explicitly limits those persons who may inspect or copy consent forms or doctor's records to the husband, wife, supervising doctor, or custodian of the records, unless a court issues a conflicting order for good cause shown.¹⁹¹ On public policy grounds¹⁹² the court could prevent the sperm donor from being identified. Even if the court were to release the donor's name, he would still be protected by the irrebuttable presumption of section 3111.031(A) that the wife's husband who has consented to this procedure is the natural father of the child thereby conceived.¹⁹³ At the same time, adopted children could still get information regarding their natural parents, including genetic information, upon a showing of good cause.¹⁹⁴ Finally, the Bill offers protection to the sperm donor whose sperm is used to inseminate a married woman.¹⁹⁵ It states that he "shall not be treated in law or regarded as the natural father of the child so conceived and that child shall not be treated in law or regarded as the natural child of that man."¹⁹⁶

However, if artificial insemination is used without a husband's consent or without a licensed doctor's supervision, or if his sperm is used to inseminate an unmarried woman, the donor possibly could still be charged with legal responsibility for the child. These omissions result from legislative reluctance to address certain controversial issues.¹⁹⁷ A basic statute will at least protect donors when doctors and donors are careful to work within the law.

While the five provisions of HB 147¹⁹⁸ all serve useful purposes, a much broader statute should be passed by the Ohio legislature. Many important issues are not

he can trace the donor through his code and discontinue using that donor's sperm. Dr. Schweizer indicates that this practice is not uncommon among AID-performing doctors. Interview with Dr. Schweizer; telephone interview with Dr. James Goldfarb, Repro. Endocrin., Cleveland, Ohio (Feb. 4, 1985). Dr. Goldfarb is one of six reproductive endocrinologists in Cleveland, Ohio. Like Dr. Schweizer, he is opposed to reporting requirements, but sees little problem if compliance is not mandatory. Interview with Dr. Goldfarb.

188. Telephone interview with Dr. Goldfarb, Repro. Endocrin., Cleveland, Ohio (Feb. 4, 1985).

189. *Id.*; telephone interview with Dr. Frederick Schweizer, Repro. Endocrin., Columbus, Ohio (Jan. 30, 1985) (he estimated that "99.99%" are never told); telephone interview with Dr. Grant Schmidt, Asst. Prof. Obs. & Gyn., Ohio State Univ. (Jan. 29, 1985); *Model Statute*, *supra* note 16, Commentary to Statute at 1 ("Most children conceived by A.I. are never told that they are, in effect, 'adopted.'").

190. HB 147, *supra* note 21, § 3111.031(C).

191. HB 147, *supra* note 21, § 3111.031(D).

192. *See infra* Part IV.

193. *See supra* text accompanying notes 182-83.

194. *See Eisenman*, *supra* note 1, at 389-90.

195. HB 147, *supra* note 21, § 3111.031(E).

196. *Id.*

197. As one author noted, "AI legislation may not be easy to enact because some members of the public are still strongly opposed to AI." Shaman, *supra* note 17, at 351. Therefore, legislators must decide whether to introduce bills that cover all bases, and face much opposition, or bills that protect donors, children, parents, and doctors in the most common uses of AID, and face much less opposition. Telephone interview with Rep. Marie Tansey, Ohio Gen. Assem. (Jan. 18, 1985).

198. HB 147, *supra* note 21.

addressed at all by the UPA¹⁹⁹ or the OPA.²⁰⁰ The following section reviews the need for a comprehensive statute regulating donor insemination, and presents suggestions for such a statute.

VI. THE NEED FOR A COMPREHENSIVE AID STATUTE—NECESSARY PROVISIONS

Strong public policy reasons support the need in all fifty states for a statute concerning artificial insemination by donor. The case law on this procedure is confused and inconclusive, leading to a great deal of unpredictability in the law.²⁰¹ Before the *Gursky* opinion declaring AID-conceived children illegitimate,²⁰² many lawyers believed that an artificial insemination by donor statute was unnecessary, since the rights and duties of the parties seemed obvious.²⁰³ No longer can this be assumed. "The absence of laws has created a regulatory void in which no one is protected."²⁰⁴ With the high level of uncertainty, "the present situation makes a mockery of the 'welfare of the child' principle professed to be the governing maxim of family law."²⁰⁵ Since the procedure is not uncommon, despite the risks, many children are currently unprotected.²⁰⁶ Artificial insemination by donor statutes, if well written, would protect them.

One author argues that donor insemination should not be encouraged through legislation until our society does studies on how AID-conceived children fare psychologically and physically.²⁰⁷ Since many children may never be told that they were conceived through the use of donor insemination,²⁰⁸ studies may not be possible for many years, if ever. In the meantime, the children currently are facing legal dilemmas that may not be properly resolved if courts are unable to rely on modern legislative guidelines.

The same author argues that genetic knowledge among practitioners in this field seems inadequate.²⁰⁹ Yet, studies have shown that the incidence of genetic defects is lower in children conceived by artificial insemination by donor than those conceived by natural means.²¹⁰ Provisions in donor insemination statutes can establish genetic

199. UPA, *supra* note 81.

200. OPA, *supra* note 18.

201. *See supra* notes 28–78 and accompanying text; *see also* Clapshaw, *supra* note 4, at 269.

202. *Gursky v. Gursky*, 39 Misc. 2d 1083, 242 N.Y.S.2d 406 (Sup. Ct. 1963), discussed *supra* text accompanying notes 44–49.

203. In re Adoption of Anonymous, 74 Misc. 2d 99, 345 N.Y.S.2d 430 (Sur. Ct. 1973); *Model Statute*, *supra* note 16, Commentary to Statute at 1 ("The law, until the 1970's, contained a very strong presumption that any child conceived or born in wedlock was the child of the husband.").

204. Jenkins, *supra* note 1, at 62.

205. Clapshaw, *supra* note 4, at 262.

206. *See supra* notes 10–17 and accompanying text. While in Columbus, Ohio the use of AID has decreased, *supra* notes 167–68 and accompanying text, it is still occurring here to some degree.

207. Annas, *supra* note 13, at 6.

208. *See supra* note 189.

209. Annas, *supra* note 13, at 8.

210. Smith, *supra* note 137, at 40 (Smith relies on the work of Dr. J.K. Sherman, Prof. of Anatomy, Univ. of Ark. for Med. Sciences, a leader in developing standards for human semen cryobanking, or storage, for his statements that studies show decreased incidences of birth defects in children conceived by artificial insemination as opposed to natural

testing requirements that would ensure, as much as physically possible using present technologies, against transmission of defects. One doctor believes, however, that the present system is cheaper and just as successful as any system requiring set testing would be.²¹¹ Whether a statute delineates requirements or not, the practice of artificial insemination may actually lead to the development of fewer genetic problems in children.

There are a variety of other medical and social reasons why artificial insemination by a donor is beneficial and frequently used. Couples generally use the procedure for one or more of the following reasons: One of the spouses is infertile;²¹² the spouses' Rh blood incompatibility may cause stillbirths;²¹³ or genetic diseases may otherwise be transmitted.²¹⁴ These are valid reasons for seeking an artificial means of reproduction. Since people are utilizing reproductive technologies, legislatures should promulgate laws to guide, define, and protect their actions.

A useful artificial insemination statute will protect donors, children, parents, and doctors, while allowing all involved parties to retain as great a degree of privacy as possible. Such a statute should begin with definitions of the parent-child relationship, just as in the OPA,²¹⁵ and a definition of artificial insemination,²¹⁶ and should establish that the parent-child relationship applies for all purposes, including support, visitation, custody rights, and inheritance. It should state that the presumptions of paternity, as provided in section 3111.03 in Ohio,²¹⁷ apply unless this procedure is involved, in which case a provision similar to section 3111.031 of Ohio's HB 147²¹⁸ will conclusively apply.

The statute should also offer the donor the right to consent to be the father of the child. While this provision mainly protects single women who choose to be artificially inseminated, it recognizes the fact that single women do choose to have children by using this procedure, and that the donor should be allowed to claim the child as his own, if both parties so desire.²¹⁹ The statute should clearly state that the donor has no rights or duties to the child unless the parties agree otherwise.²²⁰

means); *see also infra* note 211, telephone interview with Dr. James Goldfarb, Repro. Endocrin., Cleveland, Ohio (Feb. 4, 1985).

211. Telephone interview with Dr. James Goldfarb, Repro. Endocrin., Cleveland, Ohio (Feb. 4, 1985). Currently, most doctors use medical students as donors; therefore, the donors, in general, are men who realize the importance of certain family genetic details and know what information is crucial to the safety of their sperm. When the donor's history reveals that a test is necessary (Tay-Sachs for Jewish people; sickle cell for black people), it is performed. This process spares the expense of performing a series of expensive tests on every donor. *Id.*

212. *See supra* note 8; Wadlington, *supra* note 7, at 782; Shaman, *supra* note 17, at 331. Artificial insemination provides an alternative to adoption for infertile couples facing a shortage of adoptable children. Knoppers, *supra* note 137, at 108.

213. Shaman, *supra* note 17, at 332; Wadlington, *supra* note 7, at 782.

214. Wadlington, *supra* note 7, at 802.

215. *See supra* notes 123-27.

216. *See, e.g.,* OR. REV. STAT. § 677.355 (*see definition at supra* note 2); *Model Statute, supra* note 16, § 1 (same as definition in OR. REV. STAT. § 677.355).

217. *See supra* notes 128-33 and accompanying text.

218. *See supra* text accompanying notes 180-84.

219. *Model Statute, supra* note 16, § 2(a); *see also* Comments to Statute at 2.

220. *See, e.g.,* WIS. STAT. ANN. § 891.40(2) (West Supp. 1985) ("The donor . . . is not the natural father of a child conceived, [and] bears no liability for the support of the child and has no parental rights with regard to the child.").

In order to protect the privacy of the parties as well as to match the donor's characteristics with the husband's, the statute should require the physician to provide the woman, and her husband, if married, with genetic and family medical history, race, age, hair and eye color, height and weight, and any other information that the donor agrees to provide.²²¹ The statute should require that information identifying the donor be kept by the doctor who performs the insemination, or by the lab which collects the sperm, for a limited period of time such as five years.²²² Thus, if any genetic defects occurred, the donor could be traced. This information would be obtainable only upon court order, and only if necessary in order to give a child medical treatment or remove a donor with genetic disorders from a sperm donation list.²²³

Only licensed doctors should be allowed to perform artificial insemination by donor,²²⁴ and they should be required to test the sperm donor for general health, blood type, Rh factor, and genetic history.²²⁵ The doctor should be protected from civil liability if he or she has informed the patients and donors of the risks involved in the procedure.²²⁶ These provisions would protect all of the affected parties, including the donor and the properly prudent doctor. The AID-conceived child is more likely to be in good health if some minimal health guidelines and tests are required, and parents can rest assured that the likelihood of conceiving a healthy baby is high.²²⁷

VII. CONCLUSION

In order to demonstrate the need for all states to have statutes concerning artificial insemination by donor, this Note has examined Ohio's current parentage laws, the relevant cases and statutes in the United States, and a few of the problems that can occur under Ohio's law. House Bill 147, a bill adding a provision regarding this procedure in Ohio law, was analyzed to demonstrate what a skeletal statute can offer. Widespread use of AID calls for a broader statute that offers more certainty than current law.²²⁸ It is hoped that this Note will inspire the Ohio General Assembly to pass a statute containing many of the suggested provisions, and that other states will look to Ohio's law as an example. "The time has come—in fact, is long overdue—when legislatures must set standards for artificial insemination by donors, declare the legitimacy of the children, and protect the liability of all directly involved with this procedure."²²⁹

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221. *Model Statute*, *supra* note 16, § 7.

222. *Model Statute*, *supra* note 16, § 7. According to the Interprofessional Commission on Education and Practice's Policy Analysis Panel, the "need for such information most probably would arise with any urgency only during the first five years of the child's life. Within that time, most diseases or defects that could be inherited would become known." *Id.*, Commentary to Statute at 4.

223. *Id.*

224. *Model Statute*, *supra* note 16, § 8.

225. *Model Statute*, *supra* note 16, § 9.

226. Telephone interview with Dr. James Goldfarb, Repro. Endocrin., Cleveland, Ohio (Feb. 4, 1985).

227. *See supra* note 210.

228. House Bill 476, the successor to House Bill 147, is a good example of a more detailed and useful AID statute than House Bill 147 presented. *See supra* note 176.

229. Behrman, *Artificial Insemination and Public Policy*, 300 NEW ENG. J. MED. 619-20 (Mar. 1979).

STATEMENT OF OWNERSHIP, MANAGEMENT, AND CIRCULATION

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